

**Exchange of Letters by Legal and Constitutional Scholars
on the Puerto Rico Statehood Admission Act, H.R. 1522, and the Puerto Rico Self-
Determination Act, H.R. 2070**

April 2021

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April 12, 2021

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

The Honorable Charles Schumer
Senate Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Kevin McCarthy
House Republican Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable Mitch McConnell
Senate Republican Leader
U.S. Senate
Washington, DC 20510

Dear Speaker Pelosi, Majority Leader Schumer, and Leaders McCarthy and McConnell:

We, the undersigned legal and constitutional scholars, write to express our strong opposition to the Puerto Rico Self-Determination Act, H.R. 2070, and its Senate companion bill, S. 865, and to register our equally strong support for the Puerto Rico Statehood Admission Act, H.R. 1522, and its Senate companion bill, S. 780.

Like all Americans, we support self-determination. But unlike the supporters of the Puerto Rico Self-Determination Act, we believe that genuine self-determination requires the United States to offer Puerto Ricans a real choice. By “real,” we mean *constitutional* and *non-territorial*. Puerto Rico’s self-determination options must be *constitutional*, for the obvious reason that neither Congress nor Puerto Rico has the power to implement an unconstitutional option. And they must be *non-territorial*, because a territorial option is not self-determination.

There are two, *and only two*, real self-determination options for Puerto Rico: statehood and independence. Yet the Puerto Rico Self-Determination Act defies constitutional reality by calling upon Puerto Ricans to define other non-territorial options. *There are no other non-territorial options*. For many decades, advocates of “commonwealth” status argued that it was non-territorial. They argued that when Puerto Rico made the transition to commonwealth status in 1952, it ceased to be a U.S. territory, became a separate sovereign, and entered into a mutually binding compact with the United States. But they were wrong. Quite simply, Congress does not have the power to create a permanent union between Puerto Rico and the United States except by admitting Puerto Rico into statehood. Lest there be any doubt, the U.S. Supreme Court has repeatedly and recently refuted the controversial “compact theory.” In *Puerto Rico v. Sanchez Valle* (2016), the Court ended seven decades of debilitating debate over the question of whether Puerto Rico’s commonwealth status created a permanent union between two separate sovereigns with an unequivocal “no”: as the Court made clear, Puerto Rico is, and always has been, a U.S. territory, and Congress retains plenary power to govern the island under the Territory Clause of the Constitution (Art. IV, §3, cl.2). And in *Financial Oversight and Management Board of Puerto Rico v. Aurelius Investment LLC*. (2020), the Court went on to explain that Congress’s creation of a federal board with substantial powers over Puerto Rico’s local government was a permissible exercise of Congress’s plenary power over a U.S. territory. In short, as long as Puerto Rico is neither a state of the Union nor an independent nation, it will remain a territory. By inviting Puerto Ricans to define non-territorial options other than statehood or independence, the inaptly named Puerto Rico Self-Determination Act disserves its purported goal by perpetuating the pernicious myth that such options exist. They do not.

Despite longstanding political division within Puerto Rico, Puerto Ricans have long shared an overwhelming consensus on two key points: They reject territorial status and they wish to remain U.S. citizens. But while both statehood and independence would fulfill the goal of self-determination, only one of those options would guarantee U.S. citizenship: statehood. Last November, in an unmistakable effort to determine their political future, a clear majority of Puerto Ricans voted “yes” in their own referendum on statehood. Now that Puerto Ricans have publicly and officially asked for statehood, it is time for the United States officially to offer it. The Puerto Rico Statehood Admission Act does just that.

Proceeding respectfully, cautiously, and pragmatically, the Puerto Rico Statehood Admission Act responds to the November referendum with an offer of statehood and sets the terms for admission, but it makes admission contingent on a *second* referendum in which Puerto Ricans would ratify their choice. Were they to do so, the President would issue a proclamation admitting Puerto Rico as a state within one year of the vote. If they were to reject statehood, then the island would remain a territory with the option to pursue sovereignty at any time in the future—so the Act does not force statehood on Puerto Rico in any way. In other words, the Puerto Rico Statehood Admission Act respects the result of Puerto Rico’s referendum by responding with concrete action, while ensuring that Puerto Ricans have the first and last word on their future.

In the 123 years since the United States annexed Puerto Rico, Congress has never offered Puerto Ricans the choice to become a state. Instead, the United States has allowed Puerto Rico to languish indefinitely as a U.S. territory, subjecting its residents to U.S. laws while denying them voting representation in the government that makes those laws. We strongly support a congressional offer of statehood to Puerto Rico, and we urge Congress to pass the Puerto Rico Statehood Admission Act immediately.

Signed,*

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[The following letter responds to the April 12 letter above. It is dated several days earlier because it was written in response to a draft of the April 12 letter that circulated for signatures. The April 12 letter did not change from the draft to the final version above, except for the addition of signatories.]

April 9, 2021

Dear colleague:

We are professors of Constitutional Law at ABA approved law schools in Puerto Rico. We have read the draft letter that has circulated seeking the endorsement of Constitutional law professors for a statehood admission bill for Puerto Rico and the rejection of another congressional bill purporting to create a different process for the solution to the question of Puerto Rico's relationship with the United States. Instead of engaging in the political controversies regarding what we call in Puerto Rico "the status question", the letter presents itself as constitutional context to the bills under consideration by the US Congress. However, there is a highly political content in various assumptions ingrained in the letter.

Because we disagree with or find acutely problematic some of those assumptions, we are not willing to sign the letter and want to share a brief explanation for our reasons. Before that, we would like to commend this effort to promote the discussion of the Puerto Rico situation. Indeed, we agree with most of the historical background information provided in the letter and the significance of Congress taking affirmative steps to address the issue.

However, it is equally important to acknowledge the highly contested nature of what the people of Puerto Rico support. Even if we agree for the sake of the argument that there is "an overwhelming consensus" in rejecting territorial status and the wish to remain U.S. citizens, it would be fair to also acknowledge that another key point of consensus is that Puerto Rico possesses and sees itself as having a national and cultural identity distinct from the US. How to reconcile that separate identity with the desire to keep US citizenship has been a legal and historical conundrum. To say that the logical solution is statehood may be an arguably sustainable statement, but it is nonetheless a political stance.

In fact, there is a very basic political disagreement among Puerto Ricans regarding the nature of the problem itself. While many, especially statehood supporters, view it as a question regarding the civil and political rights of U.S. citizens residing in Puerto Rico, others, mostly those supporting some form of sovereign status for the country other than statehood, regard it as involving the right to self-determination of a distinct nation (Puerto Rico, however politically subordinated it may be at this moment) and a distinct people (Puerto Ricans, however geographically dispersed). In this context, still another point of contention is the extent to which the political status of Puerto Rico should be addressed merely as a matter of U.S. domestic law or as a question governed by well established norms of international law concerning self-determination and decolonization. Those norms are part of the law of the United States, either as international

customary law, or as treaty law since the International Covenant on Civil and Political Human Rights entered into force for the United States in 1992.

We also believe it would be fair to acknowledge that a key point where no overwhelming consensus exists is precisely a preference for statehood. The letter states the following: “Last November, in an unmistakable effort to decide their political future, a clear majority of Puerto Ricans voted ‘yes’ in their own referendum on statehood.” The precise fact is that with a turnout of 54.72%, the result of the November status referendum was 52.52% in favor of statehood and 47.48% against it. Whether those results show a clear majority for the type of irreversible decision that statehood implies, is a contested issue. The significance of these results in favor of statehood cannot be denied or diminished. However, to conclude that the issue is settled for the people of Puerto Rico is inaccurate. In fact, the results of the November 2020 elections, pertaining to the selection of government officials, were a reflection, if there ever was one, of the complicated interplay between majorities and minorities in Puerto Rican politics. While the candidates for Governor and Resident Commissioner in Washington of the pro-statehood New Progressive Party (NPP) won the elections by plurality votes, the majority of those elected to the new Puerto Rico Legislative Assembly are opponents of statehood and do not support the Admission Act. Some may say that this division resembles the referendum results, in the sense that though there are numerical winners, the outcomes do point to a divided political community.

The letter makes a basic assumption that there are only two solutions to the current situation: statehood and independence. Some of us may ultimately agree with that assessment, which is not free from political preferences. However, there are people in Puerto Rico, not necessarily commonwealth supporters, who are willing to accept, and even endorse, a third option: what may be loosely called the status of free association. This would require a freely agreed covenant between a sovereign Puerto Rico and the United States regarding whatever aspects of the relationship the two entities deem appropriate to submit to mutual agreement, including such things as citizenship, free movement of people, trade, defense, economic assistance and others. This is not only a legitimate solution recognized by the United Nations and the international body of law regarding decolonization, but it is a type of relationship which the United States has embraced with a number of formally sovereign countries in the Pacific.

The letter also seems to fully dissolve the question of the status of Puerto Rico into the issue of citizenship. Although citizenship is definitely one aspect of the problem, the political status question cannot be reduced to a matter of preserving U.S. citizenship or not. In fact, the assertion that the only way to guarantee U.S. citizenship to Puerto Ricans is through statehood is a highly problematic one. The idea has been questioned by respectable scholarship on the matter.

Still another flaw of the letter that has been circulated is its outright, even vehement, rejection of the Self-Determination Bill that has been introduced in Congress by a number of well-known Members familiar with the Puerto Rico status question and supported by dozens of non-governmental, some of them grassroots, organizations in the U.S. and Puerto Rico. The Bill is intended to provide for a process of self-determination and decolonization organized by the

Puerto Rican people themselves with the backing of the U.S. government. It recognizes the right of the Puerto Rican people to convene a political status convention to define and negotiate with the U.S. the terms of any possible outcome, including statehood. The Puerto Rican electorate would make any final decision in one or a number of popular referenda.

This communication is not meant to endorse the Self-Determination Bill as it stands and its individual signatories reserve their right to support or not whatever final version emerges. However, we think that it is not appropriate at this stage to fully dismiss that effort the way the letter that has been circulated does. We deem it necessary to clarify several things in this regard.

First of all, the idea of a political status convention as a mechanism to address the status question in a deliberative, detailed and, ultimately, consensual manner is not new. It was born in Puerto Rico out of numerous proposals made throughout several decades by political and civil society groups of diverse nature. The Puerto Rico Bar Association, for example, the largest association of lawyers in the country, for years has been elaborating and endorsing the notion of a convention aided by studies and reports prepared by a special commission whose members have included independence, commonwealth, free association and statehood supporters. In fact, all political parties in Puerto Rico, except for the pro-statehood New Progressive Party (NPP), have at one time or another endorsed the idea of some type of convention to deal with the problem. Perhaps this fact has induced the authors of the circulated letter to equate support for statehood with rejection of the idea of a convention. However, statehood advocates cannot be lumped into membership in the New Progressive Party, as the November 2020 elections demonstrated. While statehood obtained 52.52% of those who voted in the referendum, the NPP governor who was elected only garnered 33.24% of the vote. There were pro-statehood candidates in other parties who supported the idea of a status convention. So, the impression that if you are for statehood you must reject the type of convention mechanism incorporated into the Self-Determination Bill is unfounded, to put it mildly. Ironically, the misgivings that some commentators have expressed regarding that Bill are based on their perception that the Self-Determination Bill may in fact end up favoring the statehood option.

The referenced letter contains important arguments in favor of statehood. Those who support that option or believe it is the better alternative for Puerto Rico will probably feel comfortable signing it. However, that is different than to support it under the assumption that the people of Puerto Rico have already made a definitive decision and that there are no other options available. Some statehood supporters may argue that 52.52% out of 54.75% of eligible voters shows a clear will of Puerto Rico on the subject even in the context of the complex situation we have described. We disagree on that and feel it was appropriate to share our view on the subject.

One thing, however, is very clear and it is something on which we could all agree. In the 123 years of its relationship with Puerto Rico, the United States government has never made a clear, binding, offer to Puerto Ricans regarding statehood, independence or free association spelling out the terms and conditions of each choice, from the U.S. perspective, in a way that may assist the people of Puerto Rico to make an informed decision regarding their political future with the fullest awareness possible of the expected consequences of their determination. We can only

hope that the discussion generated by the bills pending in Congress may be a fruitful step in that direction.

Respectfully,

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[The following letter, posted on the Constitutional Law listserv conlawprof on April 9, 2021, is my reply to the April 9 letter above.]

I'm sincerely grateful to the group of Constitutional Law scholars from Puerto Rico for their letter, and very much appreciate their thoughtful and thorough engagement with the one I've circulated (to which I will refer as "our" letter for the sake of conciseness). I will do my best to respond.

The authors say that they "disagree with or find acutely problematic some of [the] assumptions" underlying our letter. I've identified seven disagreements/criticisms.

First, the authors several times claim that our letter assumes that the result of the November 2020 referendum settled the question of Puerto Rican statehood, and they take issue with that assumption. Our letter does not make that assumption. Our letter supports the Admission Act, which responds to the referendum with an *offer* of statehood, which Puerto Ricans can accept or reject in a second referendum. This process does not treat the referendum as *settling* the question of statehood. It simply treats an offer of statehood as an appropriate response to the referendum.

Second, the authors refer to the narrow margin of victory (52.52%) and to low voter turnout (54.72%), arguing that it is "a contested issue" whether "these results show a clear majority for the type of irreversible decision that statehood implies." I assume the authors' claim is not that it is contested whether 52.52% of the vote is a clear majority: It is. If I understand correctly, the authors' claim here is that some people view this level of turnout and/or this margin of victory as not large enough for an irreversible choice in a self-determination process (such as, the choice to become a state). The claim implies, though stops short of, the argument that a self-determination vote requires super-majority turnout and/or a super-majority vote for the option that prevails to go into effect. Whatever one's view on that issue, it is not relevant to our letter, because the November referendum did not result in an "irreversible" decision. Our letter takes the position that it is appropriate for Congress to respond to the result of the referendum with an *offer* of statehood, which Puerto Ricans may accept or reject in a second referendum. Under the Admission Act, it is that *second* vote, and not the one last November, that could yield an irreversible decision in favor of statehood.

Third, the authors claim that our letter treats statehood as the "logical solution" to Puerto Ricans' overwhelming consensus in favor of remaining U.S. citizens. It does not. The relevant paragraph in our letter explains that this overwhelming consensus exists; that as between statehood and independence, only statehood would guarantee citizenship; that a majority of Puerto Ricans voted for statehood in the referendum; and that now that Puerto Ricans have asked for statehood, "it is time for the United States officially to offer it." The paragraph does not treat statehood as the "logical conclusion" of anything. It treats an *offer* of statehood as the logical—and appropriate—response to the referendum.

Fourth, the authors identify as a point of contention the question of whether the political status of Puerto Rico should be addressed merely as a matter of U.S. domestic law or as a question governed by international law. The implication here seems to be that our letter assumes that Puerto Rico's status is "merely" a matter of U.S. domestic law. But our letter does not make such an assumption. Our letter takes a position on a point of U.S. constitutional law that informs our opposition to the Self-Determination Act, and takes a position in favor of the Admission Act as an appropriate response to the referendum. Nothing in our letter forecloses the relevance of international law to Puerto Rico's status debate. We do not address international law because nothing in international law has any bearing on the points our letter makes.

Fifth, the authors claim that there is a “third option”: free association. I’ve responded at length to the same point earlier in this thread, so I won’t reiterate those arguments here except to repeat that free association is a version of independence (as the letter itself accurately indicates).*

Sixth, the authors claim that our letter “seems to fully dissolve the question of the status of Puerto Rico into the issue of citizenship,” adding that “the political status question cannot be reduced to a matter of preserving U.S. citizenship or not” and that “the assertion that the only way to guarantee U.S. citizenship to Puerto Ricans is through statehood is a highly problematic one.” To be clear, our letter states that as between statehood and independence, only statehood guarantees citizenship. This is a correct statement of basic constitutional law. It does not reduce the question of status to the question of citizenship, but rather points to the way in which citizenship would be relevant to a preference for a status option.

Seventh, the authors explain that the idea of a constitutional convention is not new, which implies that our letter suggests it is, and they claim that our letter “equate[s] support for statehood with rejection of the idea of a convention.” Neither the implication nor the claim is correct. Our letter objects to the proposal for a constitutional convention in the Self-Determination Act for the reason we explain in the letter. It does not imply that the idea of a constitutional convention to resolve Puerto Rico’s status is new nor does it express a view on constitutional conventions in general, or even in Puerto Rico.

One final clarificatory point: The authors open by describing our letter as supportive of “a statehood admission bill.” This is not exactly inaccurate, but stated in those generic terms, it risks misleading the reader by implying that the bill we support simply admits Puerto Rico into statehood. To be clear, our letter supports the Admission Act in part because it does *not* simply admit Puerto Rico into statehood, but rather calls for a second referendum, in which Puerto Ricans could vote yes or no on statehood once Congress has offered it (as you’ve all probably grown tired of hearing me say).

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* [The following is a condensed version of an earlier message I posted on conlawprof, to which the fifth point here refers.] The United States has three compacts of Free Association: with the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. Each of these is an *independent country* with a compact of free association with the United States. None of these compacts provides for birthright U.S. citizenship. Free association does not guarantee permanent union or birthright U.S. citizenship prospectively. It does not guarantee permanent union because the parties to a compact of free association are independent sovereigns who retain the power to withdraw from the relationship. It does not guarantee birthright citizenship prospectively because even if the United States were to agree to grant it (which is unlikely, though theoretically possible), the United States would always have the power to stop granting it. In short, although free association status has been described as a “third” option, it is nevertheless a version of independence.